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THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

Draft articles on The Law of Non-Navigational Uses of International Watercourses: titles and texts of articles 1 to 33 adopted by the Drafting Committee on second reading

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

Part I

INTRODUCTION

Article 1

Scope of the present articles

1. The present articles apply to uses of international watercourses and of their waters for purposes other than navigation and to measures of conservation and management related to the uses of those watercourses and their waters.

2. The use of international watercourses for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

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Article 2

Use of terms

For the purposes of the present articles:

(a) "international watercourse" means a watercourse, parts of which are situated in different States;

(b) "watercourse" means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus;

(c) "watercourse State" means a State in whose territory part of an international watercourse is situated.

Article 3

Watercourse agreements

1. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof.

2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse.

3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

Article 4

Parties to watercourse agreements

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse may be affected to a significant extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

Part II

GENERAL PRINCIPLES

Article 5

Equitable and reasonable utilization and participation

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.

Article 6

Factors relevant to equitable and reasonable utilization

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

(a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;

(b) the social and economic needs of the watercourse States concerned;

(c) the dependency of the population on the watercourse;

(d) the effects of the use or uses of the watercourse in one watercourse State on other watercourse States;

(e) existing and potential uses of the watercourse;

(f) conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;

(g) the availability of alternatives, of corresponding value, to a particular planned or existing use.

2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

Article 7

Obligation not to cause significant harm

1. Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States.

2. Where, despite the exercise of due diligence, significant harm is caused to another watercourse State, the State whose use causes the harm shall, in the absence of agreement to such use, consult with the State suffering such harm over:

(a) the extent to which such use has proved equitable and reasonable taking into account the factors listed in article 6;

(b) the question of ad hoc adjustments to its utilization, designed to eliminate or mitigate any such harm caused and, where appropriate, the question of compensation.

Article 8

General obligation to cooperate

Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse.

Article 9

Regular exchange of data and information

1. Pursuant to article 8, watercourse States shall on a regular basis exchange readily available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not readily available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

Article 10

Relationship between different kinds of uses

1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.

2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors set out in articles 5 to 7, with special regard being given to the requirements of vital human needs.

PART III

PLANNED MEASURES

Article 11

Information concerning planned measures

Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of an international watercourse.

Article 12

Notification concerning planned measures with possible adverse effects

Before a watercourse State implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

Article 13

Period for reply to notification

Unless otherwise agreed:

(a) a watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate the findings to it;

(b) this period shall, at the request of a notified State for which the evaluation of the planned measure poses special difficulty, be extended for a period not exceeding six months.

Article 14

Obligations of the notifying State during the period for reply

During the period referred to in article 13, the notifying State shall cooperate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not implement or permit the implementation of the planned measures without the consent of the notified States.

Article 15

Reply to notification

1. The notified States shall communicate their findings to the notifying State as early as possible.

2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 5 or 7, it shall communicate this finding to the notifying State within the period applicable pursuant to article 13, together with a documented explanation setting forth the reasons for the finding.

Article 16

Absence of reply to notification

1. If, within the period applicable pursuant to article 13, the notifying State receives no communication under paragraph 2 of article 15, it may, subject to its obligations under articles 5 and 7, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

2. Any claim to compensation by a notified State which has failed to reply may be offset by the costs incurred by the notifying State for action undertaken

after the expiration of the time for a reply which would not have been undertaken if the notified State had objected within the period applicable pursuant to article 13.

Article 17

Consultations and negotiations concerning planned measures

1. If a communication is made under paragraph 2 of article 15, the notifying State and the State making the communication shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation.

2. The consultations and negotiations shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

Article 18

Procedures in the absence of notification

1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have a significant adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a documented explanation setting forth its reasons.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or

permitting the implementation of those measures for a period not exceeding six months.

Article 19

Urgent implementation of planned measures

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to articles 5 and 7, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in article 12 together with the relevant data and information.

3. The State planning the measures shall, at the request of any of the States referred to in paragraph 2, promptly enter into consultations and negotiations with it in the manner indicated in paragraphs 1 and 2 of article 17.

PART IV

PROTECTION, PRESERVATION AND MANAGEMENT

Article 20

Protection and preservation of ecosystems

Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourses.

Article 21

Prevention, reduction and control of pollution

1. For the purposes of this article, "pollution of an international watercourse" means any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct.

2. Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection.

3. Watercourse States shall, at the request of any of them, consult with a view to establishing lists of substances, the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored.

Article 22

Introduction of alien or new species

Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse which may have effects detrimental to the ecosystem of the watercourse resulting in significant harm to other watercourse States.

Article 23

Protection and preservation of the marine environment

Watercourse States shall, individually or jointly, take all measures with respect to an international watercourse that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

Article 24 [26]

Management

1. Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.

2. For the purposes of this article, "management" refers, in particular, to:

(a) planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and

(b) otherwise promoting rational and optimal utilization, protection and control of the watercourse.

Article 25 [27]

Regulation

1. Watercourse States shall cooperate, where appropriate, to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.

2. Unless otherwise agreed, watercourse States shall participate on an equitable basis in the construction and maintenance or defrayal of the costs of such regulation works as they may have agreed to undertake.

3. For the purposes of this article, "regulation" means the use of hydraulic works or any other continuing measure to alter, vary or otherwise control the flow of the waters of an international watercourse.

Article 26 [28]

Installations

1. Watercourse States shall, within their respective territories, employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse.

2. Watercourse States shall, at the request of any of them which has serious reason to believe that it may suffer significant adverse effects, enter into consultations with regard to:

(a) the safe operation or maintenance of installations, facilities or other works related to an international watercourse; or

(b) the protection of installations, facilities or other works from wilful or negligent acts or the forces of nature.

PART V

HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

Article 27 [24]

Prevention and mitigation of harmful conditions

Watercourse States shall, individually or jointly, take all appropriate measures to prevent or mitigate conditions that may be harmful to other watercourse States, whether resulting from natural causes or human conduct, such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.

Article 28 [25]

Emergency situations

1. For the purposes of this article, "emergency" means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural causes, such as floods, the

breaking up of ice, landslides or earthquakes, or from human conduct, such as in the case of industrial accidents.

2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.

3. A watercourse State within whose territory an emergency originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.

4. When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other potentially affected States and competent international organizations.

PART VI

MISCELLANEOUS PROVISIONS

Article 29

International watercourses and installations in time of armed conflict

International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules.

Article 30

Indirect procedures

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall fulfil their obligations of cooperation provided for in the present articles, including exchange of data and information, notification, communication, consultations and negotiations, through any direct procedure accepted by them.

Article 31

Data and information vital to national defence or security

Nothing in the present articles obliges a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that

State shall cooperate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

Article 32

Non-Discrimination

Unless the watercourse States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who have suffered or are under a serious threat of suffering significant transboundary harm as a result of activities related to an international watercourse, a watercourse State shall not discriminate, on the basis of nationality or place where the injury occurred, in granting to such persons, in accordance with its legal system, access to judicial or other procedures or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on under its jurisdiction.

Article 33

Settlement of disputes

In the absence of an applicable agreement between the watercourse States concerned, any watercourse dispute concerning a question of fact or the interpretation or application of the present articles shall be settled in accordance with the following provisions:

(a) If such a dispute arises, the States concerned shall expeditiously enter into consultations and negotiations with a view to arriving at equitable solutions of the dispute, making use, as appropriate, of any joint watercourse institutions that may have been established by them;

(b) If the States concerned have not arrived at a settlement of the disputes through consultations and negotiations, at any time after six months from date of the request for consultations and negotiations they shall at the request of any of them have recourse to impartial fact-finding or, if agreed upon by the States concerned, mediation or conciliation;

(i) Unless otherwise agreed, a Fact-Finding Commission shall be established, composed of one member nominated by each State concerned and in addition a member not having the nationality of any of the States concerned chosen by the nominated members who shall serve as Chairman;

(ii) If the members nominated by States are unable to agree on a Chairman within four months of the request for the establishment of the Commission, any State concerned may request the Secretary-General of the United Nations to appoint the Chairman. If one of the States fails to nominate a member within four months of the initial request pursuant to paragraph (b), any other State concerned may request the Secretary-General of the United Nations to appoint a person who shall not have the nationality of any of the States concerned who shall constitute a single member Commission;

(iii) The Commission shall determine its own procedure;

(iv) The States concerned have the obligation to provide the Commission with such information as it may require and, on request, to permit the Commission to have access to their

respective territory and to inspect any facilities, plant, equipment, construction or natural feature relevant for the purpose of its inquiry;

(v) The Commission shall adopt its report by a majority vote, unless it is a single member Commission, and shall submit that report to the States concerned setting forth its findings and the reasons therefor and such recommendations as it deems appropriate;

(vi) The expenses of the Commission shall be borne equally by the States concerned.

(c) If, after 12 months from the initial request for fact-finding, mediation or conciliation or, if a fact-finding mediation or conciliation Commission has been established, 6 months after receipt of a report from the Commission, whichever is the later, the States concerned have been unable to settle the dispute, any of them may, subject to the agreement of the States concerned, submit the dispute to a permanent or ad hoc tribunal or to the International court of Justice.

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Corrigendum

Article 32 (Non-Discrimination). In line 5 insert "or residence," after the word "nationality".

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Addendum

Draft Resolution adopted by the Drafting Committee

The International Law Commission,

Having completed its consideration of the topic on the Law of the Non-Navigational Uses of International Watercourses,

Having considered in that context groundwater which is related to an international watercourse,

Recognizing that confined groundwater, that is groundwater not related to an international watercourse, is also a natural resource of vital importance for sustaining life, health and the integrity of ecosystems,

Recognizing also the need for continuing efforts to elaborate rules pertaining to confined transboundary groundwater,

1. Expresses its view that the principles contained in its draft articles on the Law of the non-navigational uses of watercourses may be applied to transboundary confined groundwater;

2. Commends States to be guided by the said principles, where appropriate, in regulating transboundary groundwater;

3. Recommends States to consider entering into agreements with the other State or States in which the confined transboundary groundwater is located;

4. Recommends also that, in the event of any dispute involving transboundary confined groundwater, the States concerned should consider resolving such dispute in accordance with the provisions contained in article 33 of the draft articles, or in such other manner as may be agreed upon.